Supreme Court, U.S.
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In The

Supreme Court of the United States

NORMAN MICHAELS, Executor of the Estates of Martin Popowitz and Harriet Loria Popowitz,

Petitioner,

v.

AVITECH, INC., also known as HARGER AVIATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May a court of appeals make independent admissibility determinations under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), where *Daubert* challenges were neither raised nor decided in the court below?

2. Does *Daubert* analysis apply in the same measure on summary judgment as at trial, and what procedural protections are necessary to allow an adequate defense of expert evidentiary submissions at the summary judgment stage?

3. What kinds of expert challenges trigger enhanced judicial screening of expert evidence under *Daubert* and its progeny?

PARTIES TO THE PROCEEDING BELOW

The following persons and entities were parties before the United States Court of Appeals for the Fifth Circuit: Norman Michaels and Avitech, Inc. a/k/a Harger Aviation.

Norman Michaels is an individual, a citizen and resident of New York at the time suit was filed, and is the executor of the estates of Martin Popowitz and Harriet Loria Popowitz, who were residents of New Jersey. Avitech is a Texas corporation doing business in suburban Houston.

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The opinion of the court of appeals (App. 1-20), which is reported at 202 F.3d 746 (5th Cir. 2000), appears in the appendix, as does the opinion on judgment issued by the district court in favor of the respondent and against the petitioner (App. 21-36), which has not been reported. Also appearing in the appendix is the final order of the United States Court of Appeals for the Fifth Circuit on petition for rehearing (App. 37-38).

JURISDICTION

On April 13, 2000, the United States Court of Appeals for the Fifth Circuit denied a petition for rehearing of the judgment entered January 28, 2000. This petition for writ of certiorari is being filed within ninety days of the denial of rehearing. The jurisdiction of the Court is therefore invoked pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED

Rules 104(a) and 702 of the Federal Rules of Evidence appear in the appendix (App. 39).

STATEMENT OF THE CASE

This cause arises from a fatal aircraft accident, and originated in the United States District Court for the Eastern District of Pennsylvania as two separate lawsuits, one by Norman Michaels (Michaels) on behalf of the

estates of two of the passengers, the other by the estates of the pilot and his wife, another passenger. Named as a defendant in both cases was Avitech, Inc. t/a Harger Aviation (Avitech), alleged to have been negligent in installing, cleaning, and reinstalling part of the aircraft pneumatic system used to power certain flight instruments. Avitech filed motions to dismiss for lack of personal jurisdiction. Limited jurisdictional discovery was conducted.

The motions to dismiss were denied, but the claims against Avitech in both cases were severed and transferred to the Southern District of Texas pursuant to 28 U.S.C. § 1406. The cases were assigned to different judges as unrelated cases. A motion to consolidate was granted, the actions consolidated, and the respective plaintiffs directed to file a joint amended complaint, which they did.

An initial pretrial conference did not take place until nearly eight months later, at which time the district court advised counsel that the consolidated case had "fallen through the cracks." Counsel for Avitech complained to the court that his client ran a clean shop and did nothing which had anything to do with the happening of the accident. Michaels assured the court his expert disagreed. At the close of the conference, the parties were directed to consult and consider an abatement until the Pennsylvania actions were concluded.

The district court then entered a written "order denying abatement," which directed the plaintiffs to "designate their expert with a report that implicates Avitech"

within eighteen days, and gave Avitech a week after that to "say how long it will be until its expert will be ready."

In compliance with the order denying abatement, each set of plaintiffs designated a maintenance expert of their own and each submitted a report addressing the negligence of Avitech. Michaels' expert submitted a report that was four pages long and included a two page list of materials reviewed. The report explained how vacuum pumps are used to drive the pneumatic flight instruments and the effect of contamination found in the components on system operation. The report "implicate[d] Avitech" by discussing the aircraft maintenance performed, and concluded that Avitech failed to properly follow the pump manufacturer's procedures when removing, cleaning, and reinstalling the right pump of vacuum pressure system, which allowed contamination to lead to premature pump failure.

Avitech subsequently advised the court that it would be able to make its expert witness disclosure within three months. Though the district court had instructed Avitech to "say how long it will be until *its expert* will be ready," Avitech forwarded reports from six experts in assorted disciplines. At no time prior to submitting its own expert reports did counsel for Avitech question the sufficiency of the reports of either expert identified by either set of plaintiffs.

However, during a pretrial conference the same day the plaintiffs received the defense reports, the district court *sua sponte* challenged the sufficiency of the plaintiffs' expert reports. The court advised that counsel for Avitech had expressed an intention to file a summary

judgment motion, and that the court was "inclined to let him." The district court set a briefing schedule for the proposed summary judgment motion, stated it was going to stay discovery pending disposition of the motion, and ruled that the depositions the parties had discussed taking, including fact and expert depositions, would only be permitted to take place if counsel for Avitech agreed to the depositions, to which counsel for Avitech did not agree.

Shortly thereafter, Michaels served additional expert reports addressing matters in the defense reports such as the maintenance Avitech performed, the vacuum pump failure mode, the weather conditions existing at the time of the accident, and the actions of the pilot. Those reports included a supplemental report from Michaels' maintenance expert which discussed other common sources of contamination, ruled out water ingestion or corrosion as the contamination source, and ruled out other maintenance by another facility as the source of the debris found in the system. The supplemental report explained that continued operation of the pumps forced contaminants further into the system over time, and that publications put out by the pump manufacturer stressed to mechanics the importance of proper cleaning in that "contamination . . . can overload the pump and cause premature pump failure." The supplemental report clarified the failure scenario; that is, the left pump suffered a catastrophic failure of its internal parts and the right pump failed as the result of added stresses once it took over the workload of both pumps. The report noted the pumps would perform properly under normal loads but would fail when exposed to higher loads.

Avitech filed a motion for summary judgment, arguing that (1) there was no evidence of causal negligence by Avitech and (2) the sole proximate cause of the accident was the negligence of the pilot or the actions of others. Avitech also filed a motion to strike all of plaintiffs' expert reports, suggesting that they were submitted in "flagrant" violation of the court's rulings.

The district court granted the motion to strike and the motion for summary judgment eleven months after they were filed.

The district court held "[t]he expert witness designations violate the court's order on timing and content. They are struck." (App. 21). The district court found the interpretation of its order directing the respective plaintiffs to "designate their expert with a report that implicates Avitech" to be "totally unreasonable" because "[n]othing in the order can reasonably be construed as limiting the disclosure to a single maintenance report." (App. 25). The district court concluded that striking all the expert designations was an appropriate sanction. (App. 29).

Having stricken all of the expert reports, the district court turned to the summary judgment motion, granting the motion because the plaintiffs had no evidence that the installation of the right vacuum pump caused or contributed to the plane crash. (App. 33). Looking to the defense reports, the district court concluded that pilot negligence was the sole proximate cause of the crash. (App. 35).

Michaels appealed to the United States Court of Appeals for the Fifth Circuit, urging that the district court erred in striking his expert designations as a sanction and

that summary judgment should not have been entered because Michaels had discharged his burden in coming forward with countervailing evidence on the issues of Avitech's negligence and the claimed intervening negligence by the pilot. In its appeal brief, Avitech raised *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), for the first time, arguing the expert evidence was insufficient as a matter of law.

The Fifth Circuit affirmed, even though it held that the district court abused its discretion in striking the initial report and that Michaels' supplemental and rebuttal reports should not have been stricken since they were timely disclosed. (App. 10). The Fifth Circuit likewise found there to be a jury question on the issue of pilot negligence. (App. 13-14).

The Fifth Circuit nevertheless upheld the entry of summary judgment because "the expert testimony [the district court] struck may not have survived a *Daubert* hearing" and "the plaintiff has failed to provide evidence sufficient for a reasonable juror to find for the plaintiff by a preponderance of the evidence." (App. 10, 14).

In reaching this result, the court of appeals considered issues neither briefed nor decided in the court below, articulated new rules for the consideration of expert evidence on summary judgment, and went beyond determining whether issues of material fact existed on the record before it. Indeed, the Fifth Circuit proceeded to conduct its own *Daubert* analysis, although acknowledging "it is perhaps remiss to attempt a *Daubert* inquiry at

the appellate level when the district court did not perform one. *See Cortes-Irizarry v. Corporacion Insular de Seguros*, 111 F.3d 184, 189 (1st Cir. 1994)." (App. 16).

By engaging in its own independent *Daubert* analysis, rather than remanding to the district court for further proceedings, the Fifth Circuit foreclosed any chance for Michaels to address the claimed deficiencies in the record, an opportunity he would have had if the *Daubert* issues had been raised in the trial court. The factual foundation of the expert evidence was not before the district court, which granted summary judgment in an absence of any contrary evidence once it struck all of the plaintiffs' expert reports as untimely.

Michaels filed a petition for rehearing and a suggestion for rehearing *en banc*, asking the court of appeals to revisit its decision because there was no independent development of the *Daubert* issue in the court below and the decision was contrary to Fifth Circuit precedent and comparable decisions in other federal circuits.

Several weeks later, the Fifth Circuit issued a revised opinion (App. 1-20) tailored to address arguments made in the petition for rehearing. Rehearing was denied one month later.

REASONS FOR GRANTING THE WRIT

This case presents an important question in the administration of summary judgment motions and the interplay between summary judgment analysis and the *Daubert* admissibility analysis.

Summary judgments should be "invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them." *Associated Press v. United States*, 326 U.S. 1, 6 (1945). The court specifically cautioned in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), that the trial court's function on summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." The same is true for a reviewing court.

The decision by the United States Court of Appeals for the Fifth Circuit below conflicts with the approach of the First Circuit regarding the appropriateness of independent appellate determinations under *Daubert* in the summary judgment context and is contrary to the Court's teachings about the preliminary assessment by the trial court mandated whenever a Fed. R. Evid. 702 challenge is made to expert evidence.

Sua sponte appellate determinations under *Daubert* have due process implications. This case presents an opportunity for the Court to address the use of *Daubert* procedures in the summary judgment context, and to exercise its supervisory power and provide guidance on a number of compelling, related issues bearing on the administration of *Daubert* challenges.

I. IT IS NOT ONLY "REMISS" FOR A REVIEWING COURT TO MAKE INDEPENDENT APPELLATE *DAUBERT* DETERMINATIONS WHERE THERE HAS BEEN NO DEVELOPMENT OF THE ISSUE BELOW, BUT SUPERIMPOSING *DAUBERT* RULINGS ON A COLD RECORD TRANSFERS THE GATEKEEPING FUNCTION FROM THE DISTRICT COURT.

In its revised opinion, the Fifth Circuit stated that it was "in no way suggesting that the *Daubert* gatekeeping function may be transferred from the district court to the court of appeals." (App. 16). That is precisely the effect of its decision, however.

The admissibility of Michaels' experts' opinions under *Daubert* was not a basis for the decision of the district court. (App. 21-36). Even so, the Fifth Circuit went ahead and engaged in a *Daubert* determination of its own, dramatically changing *Daubert* practice and procedure. Litigants in the Fifth Circuit may now bypass *Daubert* challenges in the district court, raise *Daubert* for the first time on appeal, and prevail in the absence of a properly developed record.

Arising as it does in the summary judgment context, the decision of the Fifth Circuit is in direct conflict with the approach taken by the First Circuit, which has cautioned:

> If trial courts should be slow to employ *Daubert* at the summary judgment stage, appellate courts should be even more hesitant to head in that direction where there has been no development of the issue below. After all, the bifurcated inquiry into reliability and relevance which

> *Daubert* requires is best performed by trial judges who, unlike appellate judges, have a broader array of tools which can be brought to bear on the evaluation of expert testimony. Hence, we can envision few, if any, cases in which an appellate court would venture to superimpose a *Daubert* ruling on a cold, poorly developed record when neither the parties nor the nisi prius court has had a meaningful opportunity to mull the question.

Cortes-Irizarry v. Corporacion Insular de Seguros, 111 F.3d 184, 189 (1st Cir. 1997) (footnote omitted). *Cf. United States v. Charley*, 189 F.3d 1251, 1264 n.16 (10th Cir. 1999) (declining to make independent appellate determination under *Daubert* when challenge made for first time on rehearing), *cert. denied*, 120 S. Ct. 842 (2000).

There was no meaningful opportunity to mull the *Daubert* question in the trial court, where the proceedings were stayed by the district court while the summary judgment motion was pending and all of Michaels' expert evidence stricken as a discovery sanction. *Daubert* was not raised until Avitech filed its appellate brief some two months after the Court's holding in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), a case which resolved a split among the circuits and confirmed that *Daubert* applied to non-scientific expert evidence. Still, the Fifth Circuit addressed and resolved the *Daubert* issue,[1] even

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[1] The Fifth Circuit suggested that "the plaintiff's expert's theory that debris was evidence of negligence would likely have been inadmissible at trial under *Daubert* because it failed to exclude other causes," looking to the toxic tort case of *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 757 n.27 (3d Cir. 1994), *cert.*

though there was literally no development of the issue before the trial court.

The Fifth Circuit's independent *Daubert* determination has due process ramifications as well. Not only was no *Daubert* challenge made in the court below, but the summary judgment motion was briefed and argued prior to the Court's decisions in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire*, which expounded upon and expanded the reach of *Daubert*. "Given the 'liberal thrust' of the Federal Rules it is particularly important that the side trying to defend the admission of evidence be given an adequate chance to do so." *In re Paoli Railroad Yard PCB Litigation, supra*, 35 F.3d at 739. No such chance was afforded here.

The court of appeals upheld summary judgment because the expert evidence "would *likely* have been

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denied, 513 U.S. 1190 (1995), as authority for the proposition that exclusion of alternative causes is "[a] necessary ingredient" in aircraft disaster cases. (App. 16). The suggestion by the Fifth Circuit that *all* alternative causes must be ruled out is not a prerequisite to the admissibility of expert evidence. "[I]t seems clear that an expert must investigate to some extent other possible causes. Obvious alternative causes need to be ruled out. All possible causes, however, cannot be and need not be eliminated before an expert's testimony will be admitted." CAPRA, *The Daubert Puzzle*, 32 GA. L. REV. 699, 728 (1998). *Accord Viterboro v. Dow Chemical Co.*, 826 F.2d 420, 426 (5th Cir. 1987) ("admissibility of an expert opinion [does not] depend[ ] upon the expert disproving every possible cause other than the one espoused by him"). In any event, there was evidence in the record that the Michaels' expert did indeed reject water and corrosion as contamination sources and ruled out an engine washdown by another maintenance facility two weeks before the crash as the source of the debris.

inadmissible" and "*may* not have survived a *Daubert* hearing." (App. 10, 16). *Daubert* and its progeny require a more exacting assessment of admissibility, and do not permit a trial court to exclude evidence that might or might not be admissible or a reviewing court to similarly speculate as to potential admissibility. In its decision, it may truly be said, the Fifth Circuit

> has so far departed from the accepted and usual course of judicial review as to call for an exercise of the court's power of supervision.

S. Ct. R. 10(a).

II. THE COURT'S GUIDANCE IS REQUIRED TO DELINEATE THE PROCEDURAL PROTECTIONS NECESSARY FOR *DAUBERT* CHALLENGES IN THE SUMMARY JUDGMENT CONTEXT.

This case raises important questions regarding how *Daubert* is to be properly employed at the summary judgment stage, specifically, the procedural protections available when a *Daubert* challenge is made in conjunction with a summary judgment motion.

Daubert itself arose from the grant of summary judgment, 509 U.S. at 582-83, as did *Joiner, supra*, 522 U.S. at 140, and *Kumho Tire, supra*, 526 U.S. at 145, where the motion for summary judgment was also accompanied by a motion to exclude the plaintiffs' expert's testimony because his methodology failed to meet the reliability requirement of Fed. R. Evid. 702.

In each of those cases, there was a well-developed evidentiary record. The record before the trial and

reviewing courts in *Daubert* consisted of affidavits, deposition transcripts, and transcripts from previous trials. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 727 F. Supp. 570, 573 (S.D. Cal. 1989), *aff'd*, 951 F.2d 1128 (9th Cir. 1991), *rev'd*, 509 U.S. 579 (1993). The experts in *Joiner* gave depositions, 522 U.S. at 140, as did the expert in *Kumho Tire*, who gave more than one. 526 U.S. at 155-56.

The Court's decisions have not spoken to the parameters of *Daubert* at the summary judgment stage or the procedural protections necessary to provide parties with sufficient process to defend their evidentiary submissions on summary judgment. The question whether *Daubert* analysis should apply in the same measure on summary judgment as at trial is particularly troublesome.

The First Circuit recognizes that "the *Daubert* regime can play a role during the summary judgment phase of civil litigation," but has counseled against applying the *Daubert* gatekeeping function too rigorously: "A trial setting normally will provide the best operating environment for the triage which *Daubert* demands." *Cortes-Irizarry, supra*, 111 F.3d at 188. *Accord* CAPRA, *supra*, 32 GA. L. REV. at 757 (analyzing *Daubert* in the summary judgment context and concluding that "the gatekeeper function should most often be suspended until the trial of the case [because][a]ny attempt to create a sufficient record from which reliability may be assessed at the early summary judgment stage would unnecessarily expand the summary judgment proceeding into a full-blown trial on the reliability issue").

Summary judgment motions and *Daubert* motions have conflicting goals, and the timing of a summary

judgment motion and concomitant *Daubert* challenge is critical:

> [The Court's authorization in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)] of "summary judgment as a substitute for trial" must be read in conjunction with *Daubert's* recognition of the complex factors that bear on "scientific knowledge" and its praise of the adversary system in dealing with expert proof. Courts should avoid granting motions for summary judgment unless the parties had a full opportunity and incentives to develop an adequate record during the discovery phase.

BERGER, *Procedural Paradigms For Applying The Daubert Test*, 78 MINN. L. REV. 1345, 1380-81 (1994). "Because the summary judgment process does not conform well to the discipline that *Daubert* imposes, the *Daubert* regime should be employed only with great care and circumspection at the summary judgment stage." *Cortes-Irizarry, supra*, 111 F.3d at 188.

Given this dichotomy, the Third Circuit advocates in limine hearings as a procedural protection where *Daubert* challenges are made in the context of summary judgment motions. *Compare Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 417-18 (3d Cir. 1999) (where ruling on admissibility of proffered evidence under *Daubert* standard turns on factual issues, failure to hold in limine hearing may be abuse of discretion in summary judgment context) *with In re TMI Litigation*, 199 F.3d 158, 159 (3d Cir. 2000) (distinguishing *Padillas* because the district court in *TMI* held a five week long in limine hearing), *amending* 193 F.3d 613 (3d Cir. 1999). *See also* MANGRUM, *Kumho Tire Company: The Expansion Of The Court's Role In Screening Every Aspect Of*

Every Expert's Testimony At Every Stage Of The Proceedings, 33 CREIGHTON L. REV. 525, 547 (2000) ("A motion for summary judgment, unaccompanied by a pretrial *Daubert* evidentiary hearing, provides a less ideal procedure for considering the admissibility of expert testimony").

The Ninth Circuit requires serial affidavits from experts in the context of summary judgment motions. *See Claar v. Burlington Northern R.R.*, 29 F.3d 499, 502 (9th Cir. 1994) (affirming district court's requirement that experts on summary judgment submit serial affidavits explaining reasoning and methodology underlying their conclusions).

There was a complete absence of procedural protections here. Discovery was stayed pending the summary judgment motion. The expert designations were all stricken as a discovery sanction, a ruling later found to be an abuse of discretion, without a preliminary assessment of their reliability and relevance. *Compare Weisgram v. Marley Co.*, 120 S. Ct. 1011, 1019 (2000) (because of pretrial *Daubert* objection, party on notice of need to "shore up" his case at all stages of the proceedings).

III. HAVING EXPANDED THE "FLEXIBLE" REACH OF *DAUBERT*, THE COURT SHOULD ELABORATE ON THE KINDS OF CIRCUMSTANCES THAT TRIGGER JUDICIAL SCREENING PURSUANT TO FED. R. EVID. 104(a).

The Fifth Circuit's decision has far-reaching implications for *Daubert* jurisprudence, making the court of appeals the *de facto* gatekeeper of expert testimony, bypassing the preliminary assessment required of the

trial judge by Fed. R. Evid. 104(a) and *Daubert*, and even bypassing the necessity of an evidentiary challenge by the party opposing the testimony. This is contrary to the court's teachings. *See Daubert*, 509 U.S. at 592-95.

"The Court's analysis in *Daubert* suggests that . . . the evidence should be presumed to be admissible until the opponent discharges its burden to show the contrary." BERGER, *supra*, 78 MINN. L. REV. at 1365 (advocating that, in civil cases, the defendant should shoulder the initial burden of production triggering judicial screening under Fed. R. Evid. 104(a), as furthering *Daubert's* "gatekeeping objective without hampering the 'liberal thrust' of the Federal Rules vis-à-vis expert testimony").

The defense here merely disputed the plaintiffs' evidence, or at least the inferences to be drawn therefrom, which is insufficient to trigger judicial screening under *Daubert*. "Effectuating the goals of *Daubert* requires the defendant to meet a higher burden of production than merely alleging infirmities in the plaintiff's expert proof." BERGER, *supra*, 78 MINN. L. REV. at 1373.

The court of appeals likewise concluded that Michaels' expert was not correct in his theories, particularly those relating to the failure of the left pump (App. 17) – the failure of which was not in dispute by the parties. Correctness is not an admissibility requirement under *Daubert*. *See In re Paoli Railroad Yard PCB Litigation*, *supra*, 35 F.3d at 744 ("the evidentiary requirement of reliability is lower than the merits standard of correctness"). Correctness is for the jury.

Not only have the Court's decisions been silent on the factors which trigger *Daubert* analysis, but post

Daubert/Joiner/Kumho decisions by the courts of appeals do not agree whether a *Daubert* challenge is appropriate where the challenge is to an expert's conclusions rather than to the methodology used.

In *Daubert*, the Court instructed that "[t]he focus, of course, must be solely on principles and methodology, not on the conclusions they generate." *Daubert, supra*, 509 U.S. at 595. In *Joiner*, the Court suggested that "conclusions and methodology are not entirely distinct from one another." *Joiner, supra*, 522 U.S. at 146. *But see id.* at 154 (Stevens, J., dissenting in part) ("[A] critical question remains unanswered: When qualified experts have reached relevant conclusions on the basis of an acceptable methodology, why are their opinions inadmissible?")

The Sixth and Tenth Circuits hold that a *Daubert* hearing is not appropriate when an evidentiary challenge is made to the adequacy of an expert's conclusions, rather than the theory or methodology underlying those conclusions. *See Greenwell v. Boatright*, 184 F.3d 492, 497 (6th Cir. 1999) (affirming district court's refusal to hold a *Daubert* hearing where the plaintiff challenged the foundational adequacy of the defense accident reconstructionist's testimony because a *Daubert* hearing is most appropriate when challenging the scientific theory or methodology underlying the testimony, rather than the conclusions generated therefrom); *United States v. Nichols*, 169 F.3d 1255, 1263 (10th Cir.) (holding district court did not abuse its discretion in refusing to hold a Fed. R. Evid. 104(a) preliminary hearing because the defendant's challenges went to the collection of items tested by forensic explosives expert and the manner in which the lab work was

performed, rather than the expert's theory or methodology), *cert. denied*, 120 S. Ct. 336 (1999).

The Seventh and Eighth Circuits, by contrast, have upheld the use of a *Daubert* hearing based solely upon a challenge to a lack of factual foundation supporting the expert's opinion. *See Clark v. Takata Corp.*, 192 F.3d 750, 759 (7th Cir. 1999) (mechanical engineer failed to establish any factual support at *Daubert* hearing for his opinions regarding failure of lap belt or its role in causing the plaintiff's injuries); *Jaurequi v. Carter Manufacturing Co.*, 173 F.3d 1076, 1085 (8th Cir. 1999) (upholding grant of summary judgment where the plaintiff failed to make countervailing factual showing supporting summary testimony of experts whose testimony was excluded as a result of a *Daubert* hearing).

The *Daubert* inquiry is a flexible test, and the Court has resisted articulating a bright-line test for its application. Given its ever-expanding reach, however, the Court's guidance is necessary to provide the lower courts with additional guidelines as to the procedures to be used in evaluating the relevance and reliability of expert evidence, particularly in the specialized summary judgment context.

CONCLUSION

The court's role under *Daubert* and its progeny is to act as a gatekeeper, not as an "armed guard." *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, 161 F.3d 77, 86 (1st Cir. 1998). That is exactly what the court of appeals has done, with repercussions going far beyond this controversy.

For all the foregoing reasons, therefore, certiorari should be granted.

Respectfully submitted,

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REVISED – March 17, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-20851

NORMAN MICHAELS; ET AL,

Plaintiffs,

NORMAN MICHAELS, Executor of Estates of Martin Popowitz and Harriet Loria Popowitz, Deceased,

Plaintiff-Appellant,

versus

AVITECH INC, also known as Harger Aviation,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(Filed January 28, 2000)

Before HIGGINBOTHAM and SMITH, Circuit Judges, and DUPLANTIER*, District Judge.

HIGGINBOTHAM, Circuit Judge:

This is a negligence action arising from the crash of a private plane. Norman Michaels appeals the striking of

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* District Judge of the Eastern District of Louisiana, sitting by designation.

his experts and the grant of summary judgment in favor of Avitech, Inc. Although we find that the plaintiff's experts were improperly struck, we also find that no genuine questions of material fact exist, even considering all of the plaintiff's experts and reports. Thus we AFFIRM summary judgment in favor of the defendant.

I.

Norman Michaels is the executor of the estates of two people killed in a Cessna plane crash. In 1990, an aircraft service company known as Avitech replaced the right vacuum pump on the Cessna and attempted to repair oil leaks in the engine compartment. Nine days later, the left vacuum pump failed and was replaced by a different aircraft service company.

Each year between 1991 and 1993, the Cessna passed FAA required inspections. A few days before March 1, 1994, a maintenance facility in New York detected an oil leak near the turbo controller oil inlet. This facility was unable to repair that oil leak and recommended that the pilot investigate the leak further.

On March 1, 1994, the pilot of the aircraft took off from New Orleans under weather conditions which included severe thunderstorms within or surrounding his flight path. The pilot was flying without a legally current license and without current legal authority to fly in instrument-only conditions. During flight, the pilot reported the failure of pneumatic instruments that relied on the plane's gyroscopes which were powered by the vacuum pumps. Soon after this failure, radar contact was

lost. The plane broke up in midair and crashed in Alabama, killing all four on board and scattering debris across more than four miles.

The plaintiff's theory is that the left vacuum pump failed during flight, putting increased pressure on the right pump. The right pump then failed because debris in the pneumatic lines made the right pump incapable of sustaining a higher than normal workload. The failure of the two pumps then caused the gyroscopes to fail, as well as the instruments which relied on them. Consequently, the pilot was unable to navigate away from the severe weather, which resulted in the Cessna's destruction.

It is undisputed that the left vacuum pump failed catastrophically before the crash, although the plane should have been able to generate sufficient vacuum pressure with only one pump working. The right vacuum pump was not intact after the crash, either, although it is disputed whether it failed before or after the plane was destroyed.

The plaintiff sued the vacuum pump manufacturer, along with numerous others, including Avitech, in Pennsylvania. The claims against Avitech were severed and transferred to the Southern District of Texas, pursuant to 28 U.S.C. § 1406.

The plaintiff claimed Avitech negligently installed the right vacuum pump, failed to repair oil leaks, and failed to clean the pump lines.

After the case had been on file for over a year, the district court held a pretrial conference and apparently questioned the plaintiff's ability to establish a case

against Avitech. The plaintiff claimed he had an expert witness who believed Avitech was responsible. On June 12, 1997, the district court directed the plaintiff to designate, with a report, his expert witness that implicated Avitech. The federal rules require that the designation of expert witnesses "shall be made at the times and in the sequence directed by the court." FED. R. CIV. P. 26(a)(2)(C). The order to designate the expert was entered June 19, 1997, with a deadline of July 7, 1997.

On July 7, 1997, the plaintiff designated an expert, Douglas Stimpson, who provided a brief report. The plaintiff also designated Scott Goodley, who also provided a brief report essentially duplicating Stimpson's.

On September 29, 1997, Avitech designated several expert witnesses with their reports. At a conference the same day, the court directed Avitech to file its motion for summary judgment on causation by October 31.

On October 29, 1997, two days before Avitech had to file its motion for summary judgment, the plaintiff's attorney sent Avitech a 21-page fax which included radar plots and reports from previously undisclosed experts. Over the next few days, the plaintiff also sent Avitech a copy of a "Supplemental Witness/Fact Witness Designation" identifying the four new expert witnesses and providing a significantly revised and expanded report from Stimpson; the plaintiff also sent a correction to his "Supplemental Expert Witness/Fact Designation," as well as a "Second Supplemental Expert Witness Designation."

Avitech moved to strike the plaintiff's original report because it was so insubstantial as to not meet the court's original order. Avitech moved to strike the subsequent

reports as untimely. The district court struck them all. The district court entered summary judgment in favor of the defendant, and the plaintiff appealed.

II.

The district court's June 12, 1997, order required that "the plaintiffs must designate their expert with a report that implicates Avitech and any three witnesses they believe need to be deposed." The plaintiff's original expert designation and report, although brief, at least implicates Avitech by providing some theory of Avitech's negligence with respect to equipment whose failure was implicated in the crash.

Stimpson's report claims that his examination of the wreckage discovered debris in the pneumatic lines. Because both pumps feed into the same lines, the replacement of either pump could have contaminated these lines if the pump lines were not properly cleaned after installation. Because both pumps were replaced in 1990, it is conceivable that either or both installations failed to properly clean the lines or otherwise introduced contamination.

Stimpson's report, however, provides no direct evidence that Avitech failed to clean the pump lines or negligently installed the pump. The maintenance records cited in Stimpson's report indicate that Avitech blew out the lines, as required, and Stimpson gives no reason for the claim that the pump was negligently installed.

However, Stimpson did note that the maintenance records indicated that Avitech found numerous oil leaks

but did not correct them. From this, Stimpson concluded also that the failure to correct the oil leaks contaminated the pneumatic system which led to the failure of the pumps.

Stimpson's report, then, facially establishes that the pneumatic system may have been contaminated from oil leaks which Avitech failed to repair. Even assuming that Avitech cleaned the lines and that the second maintenance facility perhaps did not, Stimpson's report still "implicates" Avitech, since it pinpoints them as one source of contamination. If both Avitech and the subsequent facility were sources of contamination, however, that does not necessarily relieve Avitech of liability, so long as the sources of contamination combined to create a contaminated environment which, through a string of events, caused the plane to crash. In such an instance, the contamination could be seen as an indivisible harm which creates joint and several liability for the parties whose negligence created it. *See, e.g., Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1095 (5th Cir. 1973); *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644 (Tex. 1996) (both citing *Landers v. East Tex. Salt Water Disposal Co.*, 248 S.W.2d 731 (Tex. 1952)); *cf. Chemical Exp. Carriers, Inc. v. French*, 759 S.W.2d 683 (Tex.App.-Corpus Christi 1988, writ denied) (ground crew's negligent failure to detect contaminated jet fuel did not supersede the negligence of the fuel company which delivered contaminated fuel).[1]

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[1] For the purposes of this appeal, we have adopted the parties' implicit assumption that Texas substantive law governs the plaintiff's negligence claims.

Thus, we find that the [sic] Stimpson's original report at least "implicated" Avitech. The district court, however, struck the report because it did not live up to the standards of *Sierra Club v. Cedar Point Oil Company, Inc.*, 73 F.3d 546 (5th Cir. 1996), which states that expert reports should be "detailed and complete" so as "to avoid the disclosure of 'sketchy and vague' expert information." *Id.* at 571. *Sierra Club* found no abuse of discretion when the district court decided that a plaintiff's expert reports violated a discovery order because the reports were brief and conclusory. *Id.* Unlike the present case, however, the plaintiff in *Sierra Club* essentially admitted that it had not complied with the discovery order, and thus compliance was not at issue so much as the sanction actually imposed. *Id.* at 571 n.46, 572-73.

Furthermore, in *Sierra Club*, the district court had expressly adopted a discovery plan, and it was an "accelerated" plan. *Id.* at 569. With respect to experts, each party in *Sierra Club* had been ordered to prepare "a *complete* statement of *all* opinions to be expressed and the basis and reasons therefor." *Id.* at 570 (emphasis added). Thus, the plaintiff's failure in *Sierra Club* to provide complete disclosure was an admitted violation of an explicit and unambiguous discovery order in the context of a previously adopted and accelerated discovery plan.

In this case, however, the intended purpose of the order at issue is ambiguous. The plaintiff claims that the district court doubted that the plaintiff could find *any* negligence on the part of Avitech; thus, the district court merely wanted disclosure of some evidence of Avitech's negligence. The defendant claims that the district court

doubted that the plaintiff could prove negligence, causation, and defeat the defendant's affirmative defenses; thus, the district court wanted the plaintiff to disclose all of his expert evidence and theories.

Because the pretrial meetings were not recorded, we have little evidence which reveals their content. On file is an affidavit by an attorney for the other plaintiff below who took part in both the June and September conferences. According to her sworn statement, the parties and court "did not discuss a discovery schedule or a trial date" at the June 12, 1997 conference, which was directed primarily toward the issue of abatement. Furthermore, according to the affidavit, it was not until the September conference that the court expressed doubt as to the sufficiency of the plaintiff's expert reports and set a briefing schedule for Avitech's summary judgment motion.

Consequently, it was the plaintiff's alleged belief that the June 19, 1997 order denying abatement only required him to designate one expert who could point to some maintenance negligence on the part of Avitech, rather than designate and disclose all potential experts and expert opinions regarding negligence, causation, and the affirmative defenses.

The district court expressly found the plaintiff's understanding to be "totally unreasonable" and consequently ruled that the plaintiff had violated the discovery order by not disclosing all experts and opinions at once. As a sanction for violating the discovery order, the district court struck all of the plaintiff's expert witness designations.

While such a sanction may sometimes be appropriate for the violation of discovery orders, we can find no violation in this case because the order allegedly violated does not on its face require complete disclosure of experts and opinions, nor was the order part of a current discovery plan, let alone an accelerated plan.

Instead, the order simply instructed the plaintiff to designate one expert and report which could implicate Avitech, which the plaintiff did. Given that the district court expressed skepticism at the plaintiff's case, it would make sense to require a brief initial disclosure on the part of the plaintiff, for if the plaintiff could not overcome that low hurdle, then the case could be dismissed. As such, the plaintiff's alleged interpretation is tenable.

The defendant suggests that the district court's extreme measures resulted from the court's belief that the plaintiff tokenly complied with the literal wording of the initial order but purposefully ignored the common understanding between the parties and the court in order to gain a tactical advantage by the late designation of experts. While such bad faith might warrant the result in this case, the district court accepted the plaintiff's understanding of the order at face value, yet still found it to be unreasonable.

A district court has wide latitude in determining whether disclosure is "detailed and complete," at least when the discovery order requests complete disclosure. *See, e.g., Sierra Club*, 73 F.3d at 571-72 n.46. However, when a discovery order fails to specify complete disclosure, no current or accelerated discovery schedule is in place, and the plaintiff has some reason to believe that

less than full disclosure is required, then the discretion to find a violation must likewise be reduced. Thus, given the record before us, we find that it was an abuse of discretion to hold that the plaintiff's initial disclosures violated the discovery order. Consequently, the plaintiff's supplemental and rebuttal reports should not have been struck since it is not disputed that these reports were timely filed under the rules.

The district court was justified in his skeptical view of the case, as we will explain, and the expert testimony he struck may not have survived a *Daubert* hearing. While it may be that the district court believed it deprived plaintiff of little by his order, the record reasons for it are not sufficient.

III.

It remains to determine whether the plaintiff can withstand summary judgment, even considering all of his experts and reports. *See, e.g., In re TMI Litigation*, 193 F.3d 613, 716 (3rd Cir. 1999), (considering whether improperly excluded expert evidence sufficed to create a genuine issue of material fact), *amended by* Nos. 96-7623, 96-7624, 96-7625, 2000 WL 18950 (3d Cir. Jan 04, 2000).

Our review of the summary judgment record is de novo and summary judgment can be affirmed on any legally sufficient ground, even one not relied on by the district court. *See BMG Music v. Martinez*, 74 F.3d 87, 89 (5th Cir. 1996). Fact questions are viewed in the light most favorable to the nonmovant. *See Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1078 (5th Cir. 1995). However, only materials in the pretrial record that would have

been admissible evidence can be considered. *See Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987). After reviewing the complete summary judgment record, we find that no genuine issue of material fact exists which would preclude summary judgment for the defendant. *See* FED. RULE CIV. PROC. 56(e).

Essentially, the plaintiff's theory is that a particular chain of events which began with the defendant's negligence in 1990 led to the fatal crash in 1994. At the summary judgment hearing, however, the plaintiff abandoned his theory that the oil leak caused the plane crash. Plaintiff's counsel at the hearing noted, "I think we're getting all bogged down in the oil leak when we shouldn't be, because the problem that caused this airplane crash in our view is not the oil leak." The plaintiff has also abandoned the theory on appeal by failing to argue the theory in its briefs except to mention that "Michael's expert faulted Avitech for not taking care of the leak." Brief of Appellant at 44.

The abandonment of the theory makes sense, even though there was some evidence that after Avitech located an oil leak and made repairs, there was still some oil leaking. However, it was undisputed that the potential oil leak was at the bottom of the engine and the vacuum pumps were at the top. The plaintiff's expert never offered any credible theory as to how an oil leak could have leaked upward to contaminate the vacuum pumps other than to simply reiterate that the oil leak could contaminate the general environment. Furthermore, it was undisputed that three annual inspections of the aircraft engine between 1990 and 1994 that searched for oil leaks found none. The only oil leak ever detected was

found near the left vacuum pump days before the fatal crash. A New York facility was unable to repair this leak and instead recommended that the pilot investigate it further.

Because the plaintiff's expert had no rational explanation as to why the first oil leak mattered, given that it disappeared after 1990, yet the 1994 oil leak did not matter, despite the fact that it was near the pump which catastrophically failed, there was insufficient evidence to send the oil leak theory to a jury. Thus, this theory cannot survive summary judgment, even if we assume the theory is properly before us.

Consequently, the plaintiff must stake his case on the allegation that Avitech negligently installed the right vacuum pump and contaminated the pump lines. Assuming such negligence occurred, the plaintiff argues that over time this contamination worked its way into the system and during the fateful flight four years later, the contamination led to a failure of the left vacuum pump, which then placed an increased load on the right pump. The right pump then failed, under the increased workload, because of the contamination in the system. The failure of both pumps caused the gyroscopes to fail, and the failure of the gyroscopes caused certain instruments to fail. The lack of instruments prevented the pilot from navigating away from the most severe weather, and then the plane was destroyed by a storm that the pilot could not escape. This is quite a long chain of events, although it is not an inconceivable sequence. In fact, a cursory review of the record reveals at least some evidence that both pumps and the gyroscopes failed during flight, and that the pump system was contaminated.

The defendant argues that the pilot was a superseding cause of the accident because he took off in bad weather after receiving several warnings and because he did not have a current license or instrument rating. The record evidence, however, reveals a "battle of the experts" as to whether the weather conditions made it unreasonable for a pilot to take off that morning. Thus, summary judgment is precluded as to the pilot's decision to fly.

It is true that some courts have held that the violation of Federal Aviation Regulations is negligence as a matter of law. *See Associated Aviation Underwriters v. United States*, 462 F. Supp. 674, 680 (N.D. Tex. 1978) (citing *Gatenby v. Altoona Aviation Corp.*, 407 F.2d 443 (3rd Cir. 1969); *Gas Service Co. v. Helmers*, 179 F.2d 101 (8th Cir. 1950)). However, the violation of licensing regulations is often an exception to the general rule that the violation of a safety regulation or statute is negligence per se. *See Duty v. East Coast Tender Service, Inc.*, 660 F.2d 933, 948-49 & nn. 1-2 (4th Cir. 1981) (in [sic] banc) (Hall, J. dissenting) (collecting cases from twenty jurisdictions, including Texas, which have a licensing exception).

One reason for having a licensing exception is that there may be reasons a license has not been renewed that do not relate to the operator's lack of skill. *See* RESTATEMENT (THIRD) OF TORTS, § 12 cmt. h (D.D., 1999). For the purposes of this case, however, it does not matter whether the violation is negligence per se or merely evidence of negligence. In either case, to win on summary judgment, the defendant must show that such negligence was the sole proximate cause of the accident as a matter of law. *See, e.g., Duty v. East Coast Tender Service, Inc.*, 660

F.2d 933, 947 (4th Cir. 1981) (holding that proximate cause is still an issue for the jury even if the violation of a licensing regulation is negligence per se). If the jury believes the plaintiff's theory of the case, the fact that the pilot did not have a current license or instrument rating may be irrelevant, since the allegation is that the plane crashed because it was rendered instrumentless and the pilot was unable to navigate out of the bad weather. Under such conditions, a jury might find that the lack of instrumentation was a proximate cause of the accident. For these reasons, the defendant's affirmative defense cannot prevail on summary judgment.

Nevertheless, the plaintiff has failed to provide evidence on the issue of Avitech's negligence sufficient for a reasonable juror to find for the plaintiff by a preponderance of the evidence, which mandates summary judgment in Avitech's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986).

The plaintiff's contention is that Avitech's negligent installation of the right pump contaminated the system. Indeed, if Avitech negligently installed the pump and either introduced contamination or failed to remove contamination, then there is a reasonable inference that such contamination led first to the failure of the left pump nine days later, and then led to the failure of both pumps less than 200 flight hours after that.

However, the plaintiff still must have sufficient evidence to generate a jury question that Avitech was negligent in its installation of the right pump. The plaintiff claims that Avitech did not clean out the pump lines and check the system. However, the maintenance records

indicate that Avitech did. The plaintiff's assertion to the contrary is based on three facts: (A) debris was found in the system four years later, after the crash; (B) the left pump failed nine days after Avitech's installation of the right pump; and (C) Avitech only recorded 3.2 hours of labor for replacing the right vacuum pump, cleaning the lines, and checking the system. We examine each in turn.

A. Pump System Debris

After Avitech replaced the right pump, the left pump failed and was replaced a few days later. Four years later, during the fatal flight, the left pump failed again followed, allegedly, by the failure of the right pump. Additionally, the engine was cleaned at least four times after Avitech replaced the right pump. According to the evidence, all of the following can introduce contamination into the system: the negligent installation of a pump, the actual failure of a pump, engine cleaning, and even normal operation. In this case, debris was found after (1) four years of operation, (2) four engine cleanings, (3) three pump failures, (4) the installation of the left pump, and (5) the discovery of an oil leak near the left pump, which all agree was never fixed.

Given the variety of intervening events, the finding of debris alone cannot support any rational inference that Avitech's installation of the right pump was negligent, given that the plaintiff's experts wholly fail to address and rule out the numerous other potential causes. Had the expert's opinions undergone a *Daubert* analysis, they likely would not have been admissible, since an important factor under *Daubert* is the testability of an expert's

conclusions and theory. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993). In this case, expert testimony was necessary to establish the likely cause of an aircraft disaster. A necessary ingredient of such theorizing, however, is the exclusion of alternative causes. *See In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 757, 759 n.27 (3rd Cir. 1994).

Although the plaintiff's expert's theory that debris was evidence of negligence would likely have been inadmissible at trial under *Daubert* because it failed to exclude other causes, and although only admissible evidence should be considered at summary judgment, it is perhaps remiss to attempt a *Daubert* inquiry at the appellate level when the district court did not perform one.[2] *See Cortes-Irizarry v. Corporacion Insular De Seguros*, 111 F.3d 184, 189 (1st Cir. 1997). However, in determining whether the plaintiff has sufficient and competent summary judgment evidence for a given issue, it would be equally remiss for us to ignore the fact that a plaintiff's expert evidence lacks any rational probative value. For if evidence gives rise to numerous inferences which are equally plausible, yet only one inference is consistent with the plaintiff's theory, the plaintiff has failed to offer evidence which is "significantly probative," *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), absent at least some evidence that excludes the other potential causes. The reason for this is as follows:

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[2] Thus, we in no way suggest that the *Daubert* gatekeeping function may be transferred from the district court to the court of appeals.

Under Texas law, if a plaintiff has evidence that a defendant's negligence is a proximate cause of an accident, the plaintiff need not make any attempt to rule out other proximate causes of the accident because "[t]here can be more than one proximate cause of an injury, and all persons whose negligent conduct contributed to the injury are responsible for it." *Coleman v. Equitable Real Estate Investment Management, Inc.*, 971 S.W.2d 611 (Tex.App.-Dallas 1998).

However, if the plaintiff's only evidence of the defendant's negligence is an inference from the observation of a dangerous condition such as contaminated pump lines, then the plaintiff must at least make an attempt to rule out other likely sources of negligence because such an inference is essentially a form of *res ipsa loquitur*, even if the plaintiff does not label it as such.

Notwithstanding the fact that *res ipsa* is only applicable when the condition in question was under the exclusive control of the defendant – which was not the case here – *res ipsa* also requires an exclusion of alternative causes. *See, e.g., Harris v. National Passenger Railroad Corp.*, 79 F.Supp.2d 673, 679 (E.D.Tex. 1999) ("While *res ipsa loquitur* alleviates the plaintiff of the burden of directly proving causation, it is only applicable where the likelihood of causes other than the defendant are ruled out. . . . ").

Because the plaintiff's expert made no attempt to rule out the numerous other sources of contamination of the alleged debris, the evidence was not "significantly probative" as to the issue of Avitech's negligence, and thus does not preclude summary judgment.

B. Avitech's Time Record

The plaintiff claims that 3.2 hours was insufficient time for Avitech to correctly install the right pump, clean the lines, and check the system, yet the plaintiff gives no explanation for this claim. If such an installation, cleaning, and check takes even a fast mechanic over 7 hours, for example, then the evidence would support an inference that perhaps the pump was installed but the lines were never cleaned and the system never checked. However, the plaintiff's expert never justifies the conclusory assertion that 3.2 hours was insufficient time to do the job properly. As such, the plaintiff's evidence, without more, is insufficient to preclude summary judgment on the issue of negligence. *See, e.g., Boyd v. State Farm Ins. Companies,* 158 F.3d 326, 331 (5th Cir. 1998) ("For the purposes of summary judgment under Fed.R.Civ.P. 56(e), an expert affidavit must include materials on which the expert based his opinion, as well as an indication of the reasoning process underlying the opinion."); *cf. General Elec. Co. v. Joiner,* 522 U.S. 136, 519 (1997) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert.").

C. The Left Pump Failure

The plaintiff claims that the failure of the left pump nine days after the failure of the right pump supports an inference that the right pump must have been negligently installed. This contradicts the plaintiff's own theory that the failure of one pump puts such an increased load on the other pump that premature failure of the other pump

is expected and not uncommon. If we assume the plaintiff's own theory, however, then when the right pump failed in 1990, the left pump was immediately stressed; thus, even before Avitech replaced the right pump, the left pump would have sustained injury that brings risk of premature failure. Moreover, it is undisputed that the left pump failure occurred at the normal life expectancy of the left pump. Specifically, the left pump failed at 700 hours, while its warranty was for only 400 hours. Avitech's undisputed expert testimony stated that the left pump's life span was about what could be expected. The plaintiff still insists, however, that the failure of the left pump is evidence that Avitech negligently installed the right pump.

While the proximity in time of the 1990 pump failures might generate some speculation that a problem existed with the installation of the right pump by Avitech, the plaintiff's expert gives no analysis of the other potential causes of the left pump's failure, such as earlier failure of the right pump or the age of the left pump. In fact, it is conceivable that a problem with the left pump led to the premature failure of the right pump before the left pump initially failed. As with the case of the pump debris, the plaintiff's experts do not discuss let alone exclude the alternative causes of the left pump's failure. Thus, the expert theories on this point are simply insufficient for a reasonable juror to find by a preponderance of the evidence that Avitech committed negligence. *See Richoux v. Armstrong Cork Corp.*, 777 F.2d 296, 297 (5th Cir. 1985) ("The inferences drawn from the record, however, must be rational and reasonable, not idle, speculative, or conjectural.").

Because none of the plaintiff's inferences of Avitech's negligence are sufficient to support finding of negligence, they do not suffice to create a genuine issue of material fact that would preclude summary judgment. *See, e.g., Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1449 (5th Cir. 1993) (summary judgment is appropriate if "nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation"); *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) (if "the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free . . . to grant summary judgment"). For these reasons, we AFFIRM the grant of summary judgment.

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

NORMAN MICHAELS, *ET AL.*	§	CIVIL ACTION
PLAINTIFFS,	§	H-96-2395
	§	(Filed Sept. 3, 1998)
VERSUS	§	
AVITECH, INC.,	§	
DEFENDANT.	§	
	§	

Opinion on Judgment

1. *Introduction.*

Norman Michaels, Bonnie Weiser Brauer, and Marci Weiser Gelb are executors of the estates of four people killed in a plane crash in 1994. Avitech, Inc., which does business as Harger Aviation, replaced the right vacuum pump on the aircraft in 1990. The executors sued the vacuum pump manufacturer along with numerous others. Believing that the manufacturer would blame Avitech, they also they sued Avitech in Pennsylvania.

Avitech asks the court to strike the plaintiffs' expert witness designations and for summary judgment. The expert witness designations violate the court's order on timing and content. They are struck.

The plaintiffs have no evidence that Avitech's replacement of the right vacuum pump in 1990 caused or

contributed to the plane crash in 1994. Avitech is entitled to judgment as a matter of law.

2. *The Facts.*

In December 1990, Avitech installed a new right vacuum pump on a 1986 single-engine Cessna P-210R aircraft. Later that month, the left vacuum pump was replaced by a different aircraft service company; the second company was not sued by the plaintiffs because they mistakenly believed that Avitech replaced both pumps.

Each year between 1991 and 1993, the aircraft was inspected under Federal Aviation Administration requirements.

On March 1, 1994, the pilot of the aircraft flew into a thunderstorm. The pilot was flying without a current license and without authority to fly in instrument weather. The plane disintegrated.

3. *The Motion to Strike Expert Witness Designations.*

The rules require that designation of expert witnesses "shall be made at the times and in the sequence directed by the court." FED. R. CIV. P. 26(a)(2)(C). On June 12, 1997, the court directed the plaintiffs to designate, with reports, their expert witnesses that implicate Avitech. The order was signed June 18 and entered June 19, 1997. The deadline for the plaintiffs' designation was July 7, 1997.

On July 7, 1997, the plaintiffs designated two experts, Douglas Stimpson and Scott Goodley, who provided brief, conclusory reports. Stimpson gave three opinions;

they do little more than restate the plaintiffs' allegations. The opinions are approximately one page long. Goodley repeated, almost verbatim, two of Stimpson's opinions. Goodley used larger type, so his two opinions are also approximately one page long.

On September 29, 1997, Avitech satisfied its obligation under the court's order, designating its expert witnesses with their reports. At a conference that same day, the court directed Avitech to file its motion for summary judgment on causation by October 31.

On October 29, 1997, the plaintiff Michaels's attorney sent Avitech a 21-page facsimile which included "radar plots" and reports from previously undisclosed experts. On October 30, 1997, Avitech received from Michaels's attorney a copy of a "correction" to his "Supplemental Expert Witness/Fact Witness Designation" and a copy of his "Second Supplemental Expert Witness Designation." On November 3, 1997, after Avitech filed its motion for summary judgment, Avitech received a copy of Michaels's "Supplemental Expert Witness/Fact Witness Designation" identifying four new expert witnesses and providing a significantly revised and expanded report from Stimpson.

Avitech moves to strike the original Stimpson and Goodley designations because the reports are so insubstantial that they do not comply with the court's order to provide reports with the expert witness designation. Avitech moves to strike the additional designations and the revised Stimpson report as untimely.

4. *The Original Reports.*

The court's June 12, 1997, order required that the plaintiffs designate their experts and that the experts provide reports implicating Avitech. Experts' reports must be "detailed and complete." *Sierra Club, Lone Star Chapter v. Cedar Point Oil Company, Inc.*, 73 F.3d 546, 571 (5th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 57 (1996) (citing Advisory Committee Notes to Rule 26). The purpose of experts' reports "is to avoid the disclosure of 'sketchy and vague' expert information . . . " *Id.*

The original reports from Stimpson and Goodley do not meet this standard. The revised report later provided by Stimpson does not negate the Plaintiffs' violation of the court's order that it designate expert witnesses and provide reports. "The purpose of rebuttal and supplementary disclosures is just that – to rebut and to supplement. These disclosures are not intended to provide an extension of the deadline by which a party must deliver the lion's share of its expert information." *Sierra Club*, 73 F.3d at 571.

Michaels's attorney's dissatisfaction with the court's requirement that he disclose his expert evidence first may explain, but does not excuse, his decision to withhold almost all expert evidence until after Avitech disclosed its evidence. Rule 26 provides that the disclosures must be made "in the sequence directed by the Court." Argument by counsel that the information was not available is contradicted by counsel's written statement in a letter to the court dated October 21, 1997. In that letter, counsel stated unequivocally that he "engaged experts long before" filing suit and that "their opinions had been expressed long

before" Avitech was sued. The record reflects that Michaels's attorney elected to change the court's sequence for disclosing expert witnesses by providing superficial reports and saving the bulk of his expert evidence until after Avitech's disclosure. The attempt is unsuccessful, and the court finds that the Stimpson and Goodley reports fail to comply with its order and with Rule 26.

5. *Later-Designated Expert Witnesses.*

It is undisputed that the plaintiffs designated expert witnesses Hoxit, Cauble, Smith, Raefsky, Swiger, and Michaels (one of the plaintiffs) after July 7, 1997. The plaintiffs' counsel argues that the "the plaintiffs fairly read the reference to an 'expert with a report implicating Harger' to mean a single report from a maintenance expert." (the plaintiffs' Opposition, at 8). Giving counsel the benefit of a serious doubt and accepting counsel's representation of the plaintiffs' understanding of the order, the court finds that understanding to be totally unreasonable. The court had expressed concern about whether the plaintiffs could show a causal link between Avitech and the crash. The court directed the plaintiffs to disclose their expert evidence on that issue. Nothing in the order can reasonably be construed as limiting the disclosure to a single maintenance report.

Counsel's argument that the June 1997 order was "not a Rule 16 scheduling order" is accurate, but meaningless. Rule 26 requires that expert witness disclosures be made as "directed by the Court." There is no mention of a "Rule 16 Scheduling order."

Counsel's argument that the late disclosures were in rebuttal to Avitech's designations is also without merit. Rule 26 requires that the disclosures be made "in the sequence directed by the court." The court directed that the plaintiffs go first. The plaintiffs were apparently unhappy with that sequence, so they decided instead to identify two expert witnesses and provide incomplete reports. Then, after Avitech made full disclosure, the plaintiffs would "rebut" by designating six new expert witnesses and "supplement" by providing a revised report increasing the number of opinions twofold and the length of the opinions sixfold. The plaintiffs' sequence is not the one ordered by the court, and the court's sequence governs. The "supplemental designations" are untimely.

6. *Proper Sanction.*

The original reports did not comply with the June 1997 order or with Rule 26, and the later disclosure of six new expert witnesses was untimely. The court must now determine whether striking the expert designations is an appropriate sanction.

Rule 37(c)(1) of the Federal Rules of Civil Procedure provides:

> A party that without substantial justification fails to disclose information required by Rule 26(a) or 26 (e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.

The court considers four factors in deciding whether to strike the expert information that was not disclosed at the time and in the sequence directed by the court. *Sierra Club,* 73 F.3d at 572; 1488, *Inc. v. Philsec Investment Corp.,* 939 F.2d 1281, 1288 (5th Cir. 1991); *Geiserman v. MacDonald,* 893 F.2d 787, 791 (5th Cir. 1990).

The first factor is the importance of the witnesses' testimony. Clearly, expert evidence on causation is important to the plaintiffs' case. The importance of Goodley's expert report is reduced because the pneumatic system discussed in his report and the system illustrated by the schematic diagram included in his report are different systems. " 'The importance of such proposed testimony cannot singularly override the enforcement of local rules and scheduling orders.' Moreover, the claimed importance of the plaintiffs' expert testimony merely underscores the need for the plaintiffs to have complied with the court's deadlines or at least informed the trial judge in advance if good faith compliance was not possible." *Barrett v. Atlantic Richfield Co.,* 95 F.3d 375, 381 (5th Cir. 1996) (quoting *Geiserman,* 893 F.2d at 792).

The second factor is the prejudice to the opposing party of allowing the expert witnesses' evidence. Avitech would be materially prejudiced if the the plaintiffs were allowed to designate six new experts and significantly augment Stimpson's report. Avitech had prepared its motion for summary judgment. The plaintiffs' delay, if condoned, would result in additional expense to Avitech.

The third factor is the possibility of curing that prejudice by granting a continuance. Although a continuance is always a possibility, the plaintiffs did not request a

continuance and the court would not be inclined to grant one. Had the deadline for Avitech's motion for summary judgment been continued, the plaintiffs' late disclosures would have been later. Granting a continuance does not necessarily "deter future dilatory behavior, nor serve to enforce local rules or court imposed scheduling orders." *Geiserman*, 893 F.2d at 792.

The fourth factor is the explanation, if any, for the party's failure to comply with the discovery order. In this case, as discussed previously, the explanations offered by the plaintiffs are unpersuasive. Michaels's attorney states that "the explanation for not previously providing the expert reports is a reasonable, simple one. The plaintiffs submitted their respective report apiece implicating Harger in accordance with the June 19th order, and submitted the remainder of their expert reports as required by Rule 26 of the Federal Rules of Civil Procedure." Michaels's attorney had previously argued that the June 1997 order was not a "Rule 16 scheduling order" therefore, counsel argued, there were no "other directions from the court" and Rule 26 required only that they submit expert reports at least ninety days before the trial date. As discussed above, Rule 26 does not limit "directions from the court" to Rule 16 scheduling orders. Based on the failure of the plaintiffs to offer a rational explanation for their dilatory behavior and on the earlier conduct of Michaels's counsel in this case, the court concludes that the plaintiffs' failure to comply was an intentional attempt to obtain a tactical advantage. Counsel for Brauer and Gelb throughout this litigation has consistently simply adopted the pleadings and actions of Michaels's counsel. *See, e.g.*, Designation of Expert Witnesses (#23);

Notice of Joinder (#47, 63). Although the court does not find that Brauer and Gelb's attorney made the same conscious decision to violate the June 1997 order that Michaels's attorney made, their counsel's conscious decision to rely exclusively on Michaels's attorney leaves Brauer and Gelb in the same position as Michaels. Flagrant disregard for court orders is not acceptable.

Having considered the four factors, the court finds that the plaintiffs' failure to comply with the June 1997 order was not justified and was not harmless. Rule 37 requires that the plaintiffs not be permitted to use the late and inadequate expert information as evidence on a motion.

The plaintiffs argue that Avitech never asked for a supplement report. It is unreasonable that Avitech would believe the plaintiffs had additional information implicating it in the plane crash. Moreover, Rule 37 does not require that a party first move to compel before moving to strike. *Sierra Club,* 73 F.3d at 572.

The court will strike the plaintiffs' expert witness designations.

7. *The Summary Judgment Standard.*

Summary judgment is granted unless there is evidence "on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . . " *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Rule 56 is an integral part of the Federal Rules of

Civil Procedure, recognizing a party's right to demonstrate that certain claims have no factual basis and to have those unsupported claims disposed of before trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The plaintiffs have the burden to show with "significant probative evidence" that there is a material fact in dispute. *Texas Manufactured Housing Ass'n v. Nederland*, 101 F.3d 1095, 1099 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 2497 (1997). The burden cannot be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt about the facts, or a scintilla of evidence. *Douglass v. United Services Automobile Ass'n*, 65 F.3d 452, 459 (5th Cir. 1995), *revised on other grounds*, 79 F.3d 1415 (5th Cir. 1995) (*en banc*); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*).

8. *The Motion for Summary Judgment.*

The plaintiffs allege that Avitech negligently installed the right vacuum pump and negligently repaired an oil leak, both in 1990. The plaintiffs allege that Avitech's negligence caused the plane crash in 1994. The plaintiffs have no evidence that Avitech was negligent nor that the alleged negligence was a proximate cause of the crash. Avitech is entitled to judgment as a matter of law.

9. *Right Vacuum Pump Installation.*

The plaintiffs have no evidence that the right vacuum pump was negligently installed by Avitech in 1990. The undisputed evidence establishes that the vacuum pump operated without problems for over three years and more

than 280 flight hours after it was installed by Avitech. Three FAA-required inspections, by FAA-licensed mechanics at three different facilities, were conducted after the new right vacuum pump was installed. Each inspection resulted in a finding that the aircraft was airworthy. The plaintiffs allege that Avitech violated Federal Aviation Regulations because it did not follow the manufacturer's instructions for installing the pump. The plaintiffs have no evidence, however, to support this allegation.

Even if the plaintiffs were able to produce evidence that Avitech negligently installed the right vacuum pump, they have no evidence that the effect of this negligence would have remained after the left vacuum pump was replaced by Glueck's Aircraft service. The two pumps share most of the same plumbing, and both feed pressurized air into the same de-ice system. The plaintiffs have not alleged negligence by Glueck's. If Glueck's properly followed the manufacturer's instructions, the entire system would have been cleaned and inspected. This would have removed the effect of negligence by Avitech.

Even if the plaintiffs could produce evidence that any effect of Avitech's negligence remained after the left pump was replaced, they have no evidence that the right vacuum pump failed during the flight. The National Transportation Safety Board conduced an investigation and took photographs shortly after the crash. Although the National Transportation Safety Board's opinions and conclusions about what caused the plane crash are inadmissible under 49 U.S.C. § 1903(c), the photographs from its report are admissible because they "do not reflect the

Board's evaluation of the data they contain or the emphasis placed on that data in reaching a decision on probable cause." *See American Airlines, Inc. v. United States*, 418 F.2d 180, 196 (5th Cir. 1969). *See also Curry v. Chevron, USA*, 779 F.2d 272, 274 (5th Cir. 1985) (factual portions of the report may be admitted). The photographs illustrate significant differences between the condition of the left pump, which all parties agree failed before the crash, and the right pump. The National Transportation Safety Board's examination of the right pump showed no signs of heat stress or melting of the coupling nor of carbon deposits inside the pump housing; both conditions are associated with pump failure while the engine is running. Avitech's mechanical engineering export examined the aircraft wreckage and concluded that the right vacuum pump did not fail during flight. The plaintiffs allege that "the wreckage revealed major contamination of the entire de-ice system" which the plaintiffs claim was "contaminated with debris generated by the failure of the right pump." The plaintiffs have no evidence that the de-ice system was contaminated nor that a contamination in the system could have been caused by a failure of the right pump.

Even if the plaintiffs could present evidence that the right vacuum pump failed during flight, they have no evidence that this failure would cause the other pump to fail and cause the plane to crash. The aircraft was equipped with an electrically powered gyroscope and could have been flown and landed without the vacuum system. Additionally, the vacuum pump system on the Cessna P-210 contains four check valves that allow flow

only in one direction. These check valves prevent contaminants from flowing between the pumps.

The plaintiffs have no evidence that Avitech negligently installed the right vacuum pump on the Cessna nor that the effect of negligent installation remained after Glueck's installed the left vacuum pump. The plaintiffs have no evidence that the right vacuum pump failed during the flight nor that a failure of the right pump would cause the plane to crash.

10. *Oil Leak Repair.*

The plaintiffs allege that Avitech negligently repaired an oil leak at the oil drain pan on the bottom of the aircraft engine in 1990. They have no evidence, however, to support their allegation. As discussed previously, the airplane was inspected three times between the service by Avitech in 1990 and the crash in 1994. There are no records that the oil drain pan continued to leak after Avitech released the plane in 1990, and no leaks were noticed during the three inspections.

The plaintiffs have no evidence that a negligently repaired oil leak caused or contributed to the crash. The oil leak was on the bottom of the engine; the vacuum pumps are located at the top of the engine. Oil leaks rarely result in oil dripping from the bottom to the top.

The court also notes that a different oil leak on the plane near the turbo controller oil inlet was detected at a maintenance facility in New York a few days before the crash. Maintenance personnel at the New York facility

attempted unsuccessfully to repair the leak and recommended that the pilot investigate the leak further. There is no record that this new oil leak was successfully repaired before the crash.

The plaintiffs have no evidence of Avitech's negligence and no evidence that an oil leak in the oil drain pan caused or contributed to the crash. To the extent an oil leak played a part in the crash, the leak near the turbo controller oil inlet was nearer both in location on the aircraft and in time to the crash.

11. *Intervening Cause.*

Proximate cause under Texas law "is that cause which, in a natural and continuous sequence, unbroken by any new and independent cause, produces the injury." *Urbach v. United States*, 869 F.2d 829, 833 (5th Cir. 1989) (quoting *Cook Consultants, Inc. v. Larson*, 700 S.W.2d 231, 236 (Tex. App. – Dallas 1985, writ ref'd n.r.e.). *See also In re Air Crash*, 919 F.2d at 1087.

The plaintiffs have no evidence that Avitech's replacement of the right vacuum pump and repair of the oil leak was negligent or, if negligent, caused the Cessna to crash. Although this alone entitles Avitech to summary judgment, there is also evidence that the negligence of the pilot, Weiser, was an intervening cause of the crash that prevents liability by Avitech.

The pilot took off in violation of federal regulations. Weiser had not received the flight review required of all private pilots at least every two years. *See* 14 C.F.R.

§ 61.56(c). Weiser was also unauthorized under the federal regulations to fly in instrument weather because he did not have enough recent instrument experience or the required number of instrument approaches. *See* 14 C.F.R. § 61.57(a) and (d). Without a current license and instrument rating, Weiser could not legally fly the aircraft with passengers on board. *See* 14 C.F.R. § 61.3(a); *Paul v. Petroleum Equipment Tools Co.*, 708 F.2d 168, 171 (5th Cir. 1983) (pilot could not legally fly corporate aircraft with passengers without a commercial pilot certificate and instrument rating). One who violates a safety statute or administrative regulation, including Federal Aviation Regulations, is negligent as a matter of law. *Associated Aviation Underwriters v. United States*, 462 F. Supp. 674, 680 (N.D. Tex. 1978).

The pilot also took off having been advised that there were thunderstorms in his flight path. The pilot's negligent decision to fly into dangerous weather conditions was an intervening cause of the crash. *See In re Air Crash*, 919 F.2d at 1087 ("the sole proximate cause of the catastrophe was the deliberate decision of Flight 191's experienced crew to enter Cell D, despite having observed the tell-tale lightening that clearly marked it as a thunderstorm.").

The plaintiffs have no evidence of negligence by Avitech. Even if they did, the actions of the pilot were an intervening cause which was the sole proximate cause of the crash in 1994. Avitech is entitled to judgment as a matter of law.

12. *Conclusion.*

The plaintiffs disregarded the court's order about designating expert witnesses and providing the experts' reports. The plaintiffs' expert witness designations will be struck because they were untimely, inadequate, or both.

The plaintiffs have no evidence that the installation of the right vacuum pump caused or contributed to the plane crash. There is undisputed evidence that the pilot was flying in dangerous weather without a valid license. Avitech is entitled to judgment as a matter of law.

Signed September 2, 1998 at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-20851

NORMAN MICHAELS; ET AL

Plaintiffs

NORMAN MICHAELS, Executor of Estates of Martin Popowitz and Harriet Loria Popowitz, Deceased

Plaintiff - Appellant

v.

AVITECH INC, also known as Harger Aviation

Defendant - Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(Filed Apr. 13, 2000)

(Opinion 1/28/00, 5 Cir., ___, ___ F.3d ___)

Before HIGGINBOTHAM and SMITH, Circuit Judges, and DUPLANTIER*, District Judge.

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* District Judge of the Eastern District of Louisiana, sitting be designation.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. A. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

RULES INVOLVED

Rule 104 of the Federal Rules of Evidence provides, in pertinent part:

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Rule 702 of the Federal Rules of Evidence provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(2)

No. 00-67

SEP - 8 2000
CLERK

IN THE

Supreme Court of the United States

NORMAN MICHAELS,

Petitioner,

v.

AVITECH, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Avitech, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Petitioner mischaracterizes the facts, legal issues and the basis of the court of appeals decision in its petition. Petitioner petitions this Court for clarity in the application of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), but *Daubert* was not a basis for the decision of the court of appeals. Instead, the Fifth Circuit affirmed summary judgment applying the established summary judgment rules that have been repeatedly articulated by this Court. Instead of striking Petitioner's expert reports based on *Daubert* principles, the court of appeals found that, even giving full consideration of Petitioner's expert reports and affidavits, no disputed material issue of disputed fact was raised and Avitech was entitled to judgment as a matter of law. Petitioner's petition raises no issue that would justify this Court's review — there is no split among the courts of appeals as to any relevant legal issue, the Fifth Circuit panel was unanimous and the court of appeals simply followed well established law. Petitioner's petition for certiorari should be denied.

STATEMENT OF THE CASE

This is a negligence case arising from the fatal crash of a private single-engine Cessna aircraft in a thunderstorm on March 1, 1994, near Bay Minette, Alabama.[1] The decedents' estates brought two lawsuits against seven defendants in Pennsylvania. These first suits, against four manufacturers, were filed in Pennsylvania state court in April 1995. Two

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1. The negligence of the private pilot, a medical doctor, was so obvious that the pilot's negligence insurance policy paid a seven-figure policy limits settlement to the passengers' estates.

and one-half years later, those cases settled for millions of dollars. The day before the statute of limitations ran, decedents' estates filed more lawsuits in the United States District Court for the Eastern District of Pennsylvania against two more manufacturers and Avitech, a small Texas maintenance facility that did routine maintenance on the airplane more than three years before the crash. Petitioner mistakenly thought and alleged that Avitech had replaced the left vacuum pump on the aircraft, which failed in flight. Petitioner later discovered — after the statute of limitations had run — that Avitech had replaced only the right vacuum pump, more than three years before the crash. After extensive discovery, the suit against Avitech was severed and transferred to the Southern District of Texas.

The parties filed an agreed Joint Discovery/Case Management Plan in the district court after the transfer. Petitioner's ensuing discovery to Avitech focused on the replacement of the *left* vacuum pump. Only then did Petitioner discover that Avitech had only replaced the *right* vacuum pump. However, because Petitioner now had a limitations problem, instead of dismissing the suit against Avitech and adding the company that replaced the left vacuum pump as a defendant, Petitioner amended his pleadings to allege that Avitech's replacement of the *right* vacuum pump caused the failure of the *left* pump more than three years later.

In the Rule 26 discovery plan, Petitioner agreed to designate his experts by January 15, 1997. However, by the time of the first pretrial conference on June 12, 1997, Petitioner had still not designated any experts or taken any depositions. At that conference, counsel for Petitioner admitted to the district court that Avitech had been added as

a party to the litigation only because Petitioner anticipated that the manufacturers might try to place the blame for any pump failures on the shop that replaced the pump. At this conference, counsel for Petitioner alleged that his expert had found "debris" from "a" vacuum pump in the pneumatic system of the aircraft wreckage.

Skeptical that Petitioner could prove which of *four* alleged pump failures over a period more than three years could have been the source of the "debris," the court ordered Petitioner to designate its expert, with a report implicating Avitech. After receiving Petitioner's designation and "report," the district court stayed discovery pending a ruling on Avitech's motion for summary judgment. Avitech also filed a motion to strike Petitioner's experts, and the court heard oral argument.

The district court struck Petitioner's experts and granted Avitech's motion for summary judgment. (App. 21-36). In striking Petitioner's experts and reports, the district court agreed with Avitech, finding the Petitioner's expert reports to be "brief, conclusory" (App. 22), "superficial" (App. 25), "inadequate" (App. 29), in violation of Fifth Circuit law (App. 24), FED. R. CIV. P. 26 and the order of the court (App. 25). The court further found that "the Petitioner's failure to comply was an intentional attempt to gain a tactical advantage." (App. 28).

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. In one section of Avitech's appellee brief, Avitech pointed out that, under the *Daubert* line of cases, the district court had a gatekeeping obligation to exclude conclusory, unreliable expert testimony. However, the Fifth Circuit did *not* do a *Daubert* analysis of the reports,

or rely on *Daubert* in its review. Instead, after determining that the expert reports were improperly excluded (on grounds other than *Daubert*), the court of appeals held that even considering the reports, the summary judgment evidence submitted by Petitioner did not raise a disputed issue of material fact:

> Although we find that the plaintiff's experts were improperly struck, we also find that no genuine questions of material fact exist, even considering all of the plaintiff's experts and reports. Thus we AFFIRM summary judgment in favor of the defendant.

(App. 2).

The court of appeals based its decision to affirm summary judgment on FED. R. CIV. P. 56(e) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986). (App. 11, 14). *Daubert* was not the basis for affirming summary judgment, and the court expressly stated that it was *not* doing a "Daubert inquiry." (App. 16). The court's references to *Daubert* merely pointed out that Petitioner's experts' testimony would be unlikely to survive a *Daubert* analysis.

ARGUMENT

I. THE REVIEWING COURT DID *NOT* MAKE A *DAUBERT* DETERMINATION.

Petitioner's entire petition rests on the assumption that the court of appeals conducted a *Daubert* review of his experts' proffered testimony. Petitioner repeatedly states that "the Fifth Circuit proceeded to conduct its own *Daubert*

analysis" (App. 6), engaged "in its own independent Daubert analysis" (App. 7), and "engaged in a *Daubert* determination of its own." (App. 9). Petitioner erroneously concludes that "[t]he court of appeals upheld summary judgment because the expert evidence 'would *likely* have been inadmissible' and '*may* not have survived a *Daubert* hearing.' " (Pet. 11-12).

It is quite easy to prove that the Fifth Circuit did not do a *Daubert* screening. As Petitioner points out, the court was very skeptical of the chances of his experts passing muster under *Daubert.* Yet, as noted above, the court of appeals clearly states: "Although we find that the plaintiff's experts were improperly struck, we also find that no genuine questions of material fact exist, *even considering all of the plaintiff's experts and reports.*" (App. 2).

Had the Fifth Circuit done a *Daubert* review, and struck the experts and reports, they could not have been considered in the decision regarding summary judgment.

The fallacy of this argument is obvious. Why would the court of appeals speculate about how Petitioner's experts would fare in a *Daubert* analysis if they were *doing* one?

Indeed, the court went to great lengths to make it clear that they were *not* doing a *Daubert* analysis. Moreover, far from creating a circuit split by disagreeing with *Cortes-Irizarry v. Corporacion Insular De Seguros*, 111 F.3d 184 (1st Cir. 1997), the Fifth Circuit favorably cites the case in dicta stating that "it is perhaps remiss to attempt a *Daubert* inquiry at the appellate level when the district court did not perform one." (App. 16). In a footnote, the Fifth Circuit further stated that "we in no way suggest that the *Daubert*

gatekeeping function may be transferred from the district court to the court of appeals." (App. 16).

This is hardly indicative of "*sua sponte* appellate determinations under *Daubert* hav[ing] due process implications." (Pet. 8). The court was deliberately circumspect as regards *Daubert*, agreeing only that the district court has a gatekeeping obligation.

After concluding that it would perhaps be "remiss to attempt a *Daubert* inquiry," the court appropriately concluded that "in determining whether the plaintiff has sufficient and competent summary judgment evidence for a given issue, it would be equally remiss for us to ignore the fact that a plaintiff's expert evidence lacks any rational probative value." (App. 16).

Petitioner further erroneously argues that "[t]he factual foundation of the expert evidence was not before the district court." (Pet. 7). Respondent argued before the district court that Petitioner's expert evidence was inadequate and lacked probative value. The district court had before it a plethora of discovery, expert reports, affidavits, photographs, schematic drawings, maintenance manuals, maintenance records, pilot records, Federal Aviation Administration records, Federal Aviation Regulations, and an entire factual report on the crash issued by the National Transportation Safety Board. Petitioner fails to identify any aspect of the "factual foundation of the expert evidence" that was "not before the district court."

In his statement of the case to this court, Petitioner says that the Fifth Circuit "considered issues neither briefed nor decided in the court below." (Pet. 6). This is simply not true, and Petitioner fails to identify any such issues.

Petitioner also says the court "articulated new rules for the consideration of expert evidence on summary judgment." (Pet. 6). Again, this is not true, and again, Petitioner quotes no such language from the opinion to support this interpretation.

Petitioner further states that the court of appeals "went beyond determining whether issues of material fact existed on the record before it." (Pet. 6). This allegation is not supported by the opinion: "After reviewing the complete summary judgment record, we find that no genuine issue of material fact exists which would preclude summary judgment for the defendant. *See* FED. RULE CIV. PROC. 56(e)." (App. 11).

II. EVEN IF THE REASONING OR BASIS OF THE DISTRICT COURT'S DECISION IS WRONG, IF THE HOLDING IS CORRECT, IT MUST BE AFFIRMED AS A MATTER OF LAW.

The Fifth Circuit found that even though it was an abuse of discretion to strike Petitioner's experts, the district court's decision to grant summary judgment was correct. (App. 2). If a lower court arrives at the correct decision for the wrong reasons, the decision must be affirmed:

> It is well settled that a judgment, which is correct in ultimate effect, will not be disturbed on appeal even though the lower court relied upon a wrong ground or gave an untenable reason for its action. The issue on appeal is the correctness in ultimate effect of a judgment and not the reason or reasons given for it by the trial court. *If the judgment is sustainable upon any legal basis, it will be upheld*

> *on appeal despite the erroneous or untenable reasons given by that court for its entry.*

In re Public Serv. Co. of New Hampshire, 879 F.2d 987, 989 (1st Cir. 1989), cites omitted. *See also Brown v. Speller,* 344 U.S. 443, 459 (1953), citing *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (" 'In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.' "); *accord, Fellheimer, Eichen & Braverman, P.C. v. Charter Technologies, Inc.*, 57 F.3d 1215, 1224 (3rd Cir. 1995).

Thus, even if the trial court granted summary judgment because it struck Petitioner's experts, but the Fifth Circuit determined that, even *considering* the experts and their reports, no genuine issue of material fact exists (App. 2), the court of appeals was required, as a matter of law, to affirm the judgment. The Fifth Circuit recognized this obligation in its opinion. ("[S]ummary judgment can be affirmed on any legally sufficient ground, even one not relied on by the district court.") (App. 10), citing *BMG Music v. Martinez,* 74 F.3d 87, 89 (5th Cir. 1996); *accord, In the Matter of Larson C. Locklin,* 101 F.3d 435, 441 (5th Cir. 1996).

III. THE *CORTES-IRIZARRY* CASE IS DISTINGUISHABLE AND DOES NOT CONFLICT WITH THIS CASE.

Petitioner's reliance on *Cortes-Irizarry v. Corporacion Insular de Seguros*, 111 F.3d 184 (1st Cir. 1997) to create a split in the circuits is misplaced. In *Cortes-Irizarry*, the court recognized that "[t]he *Daubert* regime can play a role during the summary judgment phase of civil litigation. If proffered

expert testimony fails to cross *Daubert's* threshold for admissibility, a district court may exclude that evidence from consideration when passing upon a motion for summary judgment." *Id.* at 188. However, the court of appeals declined to initiate a *Daubert* analysis in the case before it for three reasons: (1) the Defendant never requested the district court to strike the Petitioner's expert statements, (2) the district court did not exclude the testimony and did not cite *Daubert*, and (3) the record on appeal was "wholly inadequate to permit a reasoned *Daubert* determination." *Id.* at 189. In this regard, the only thing the opinions in *Cortes-Irizarry* and the present case have in common is that neither district court cited *Daubert*. In all other procedurally significant respects, as regards the *Daubert* issue, the cases are easily distinguishable. Specifically, in this case, (1) the Defendant *did* ask the district court to exclude the Petitioner's expert testimony, (2) the district court *did* exclude the testimony, and (3) the record on appeal was complete and extensive.

The court in *Cortes-Irizarry* was concerned about the "inadequacy" of the record before it, stating that it could "envision few, if any, cases in which an appellate court would venture to superimpose a *Daubert* ruling on a cold, poorly developed record when neither the parties nor the *nisi prius* [trial] court has had a meaningful opportunity to mull the question." *Id.* at 189. This is simply stating the obvious. Petitioner does not cite any cases where an appellate court has made such an attempt.[2]

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2. As will be discussed later, however, the Third Circuit recently held that "cold record" assessments are "often" acceptable. *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3rd Cir. 1994).

Unlike *Cortes-Irizarry,* the record in this case was neither "cold" nor "poorly developed." The Fifth Circuit performed its *de novo* review on "the complete summary judgment record." (App. 11). The court considered "all of the Petitioner's experts and reports." (App. 2). This is hardly a "cold, poorly developed record."

IV. UNDER THE PROPER CIRCUMSTANCES, FEDERAL APPELLATE COURTS CAN AND DO INITIATE DAUBERT EVALUATIONS OF EVIDENTIARY ISSUES WHEN THERE HAS BEEN NO EXPRESS DAUBERT RULING IN THE COURT BELOW.

While it is obvious that the Fifth Circuit did not do a *Daubert* analysis in the present case, Petitioner has alleged not only that it was done, but that it was improper and represents a split in the circuits. Avitech will briefly address this.

Petitioner argues that if the Fifth Circuit were allowed to use the *Daubert* guidelines to review lower court decisions, when the lower courts have granted summary judgment but have not made explicit *Daubert* rulings, it would somehow put that circuit at odds with the First, Third, Sixth, Seventh, Eighth, Ninth and Tenth Circuits. Yet, each of these circuits has explicitly applied *Daubert* for the first time on appeal.

In *Vadala v. Teledyne Indus., Inc.*, 44 F.3d 36, 39 (1st Cir. 1995), *Daubert* was raised, for the first time, at oral argument on appeal. In affirming summary judgment, the First Circuit found that the district judge had "properly relied" on the *Daubert* "precept." *Id.* at 39.

In the case of *In re Paoli R. R. Yard PCB Litigation*, 35 F.3d 717 (3rd Cir. 1994), *cert. denied sub nom. General Elec. Co. v. Ingram*, 513 U.S. 1190 (1995), the Third Circuit had an extremely complex case which relied almost entirely on expert opinions. Between the time of the district court's grant of summary judgment and the appeal, this Court issued the *Daubert* decision. Rather than remand to the trial court for a *Daubert* review, the Third Circuit performed its own exhaustive *Daubert* analysis. *In re Paoli*, 35 F.3d at 732. In so doing, the Third Circuit observed that "evaluating the reliability of scientific methodologies and data does not generally involve assessing the truthfulness of the expert witnesses and thus is often not significantly more difficult on a cold record." *Id.* at 749. The resulting opinion was 82 pages long, and focused primarily on *Daubert* issues.

While not a summary judgment case, Petitioner cites *Greenwell v. Boatwright*, 184 F.3d 492 (6th Cir. 1999) for the notion that the Sixth Circuit "affirmed" a district court's "refusal" to hold a *Daubert* hearing before excluding expert testimony. (Pet. 17). In fact, the court of appeals simply acknowledged that the district court was not "required" to "hold an actual hearing to comply with *Daubert*." What Petitioner failed to tell the Court about this decision, however, is far more relevant to this case. The Sixth Circuit went on to find:

> Because the district court did not hold a Daubert hearing we must review the record to determine whether the district court erred in its assessment of the relevance and reliability of the expert testimony. . . . We find that this testimony satisfies the two-prong test of Daubert and was properly admitted by the district court.

Id. at 498.

In *Target Market Publishing, Inc. v. ADVO, Inc.*, 136 F.3d 1139 (7th Cir. 1998), the Seventh Circuit affirmed summary judgment in which expert testimony was excluded, but the record was unclear as to the reason for the exclusion. The Defendant argued on appeal that "what the court really did, albeit without saying so explicitly, was to exclude the [expert] report as unreliable under the standard announced in *Daubert.*" *Id.* at 1142, cite omitted. The court acknowledged that "[t]his Court first must resolve, therefore, whether the district court's Order excluded the [expert] report as unreliable under *Daubert.*" *Id.* The Seventh Circuit proceeded with a *Daubert* analysis, and found no abuse of discretion. *Id.* at 1145.

In *Bednar v. Bassett Furniture Manuf. Co., Inc.*, 147 F.3d 737, 740 (8th Cir. 1998), the Eighth Circuit reversed summary judgment, citing *Daubert* as a basis for finding expert testimony acceptable. There is no mention in the record of *Daubert* being considered by the trial court.

Contrary to Petitioner's representation that "[t]he Ninth Circuit requires serial affidavits from experts in the context of summary judgment motions," (Pet. 15), no such requirement exists in that circuit. Petitioner cites *Claar v. Burlington Northern R.R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994) as authority for this "requirement." It is true that the district court in *Claar* was dissatisfied with the first set of expert affidavits it received from the Petitioners, and gave them a second chance, but there is no suggestion that this is a Ninth Circuit "requirement," or even that it was done in any other cases. *Id.* at 500.

More significant is the fact that the trial court in *Claar* granted summary judgment after the second set of affidavits failed to meet the requirements of FED. R. EVID. 702.

Id. at 501-503. The record does not contain any references to a *Daubert* analysis being performed by the trial court. Nevertheless, the Ninth Circuit did a *Daubert* analysis of the proffered expert testimony and found no error in the district court's exclusion. *Claar* at 501-503.

It is relevant to note that the Ninth Circuit is the source of the original *Daubert* appellate decision, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128 (9th Cir. 1991). This Court vacated and remanded that decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the landmark decision that is the seminal case for the entire controversy now before the Court. Interestingly, on remand from this Court, the Ninth Circuit very deliberately did not further remand the case to the district court. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1314-1315 (9th Cir. 1995), *cert. denied, Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 516 U.S. 869 (1995). Instead, it performed an *exhaustive* review of the record below using the new *Daubert* criteria. *Id.* at 1315-1322.

The Tenth Circuit in *United States v. Davis*, 40 F.3d 1069 (10th Cir. 1994), *cert. denied, Davis v. United States*, 514 U.S. 1088 (1995), addressed a situation where the Defendants did not cite *Daubert* at trial, but raised *Daubert* issues on appeal. *Id.* at 1073. The court of appeals did an analysis of the relevant *Daubert* issues and affirmed. *Id.* at 1075.

V. THE COURT AND THE FEDERAL RULES HAVE ALREADY PROVIDED MORE THAN ADEQUATE GUIDANCE REGARDING "PROCEDURAL PROTECTIONS" NECESSARY FOR *DAUBERT* CHALLENGES IN THE SUMMARY JUDGMENT CONTEXT.

Over the last seven years, this Court has provided extensive guidelines to assist courts in gaining control over unreliable expert testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner,* 522 U.S. 136 (1997); and *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137. Petitioner now asks this Court to revisit these decisions and liberalize the rules to protect parties that provide incomplete, inadequate and sloppy expert testimony. This Court should decline.

The rules themselves are not hard to understand. When a party expects to use an expert witness pursuant to Federal Rule of Evidence 702, the expert must produce a signed, written report containing "a *complete* statement of *all* opinions to be expressed and the *basis* and *reasons* therefore," including "the data or other information considered by the witness in forming the opinions." FED. R. CIV. P. 26(a)(2)(b), emphasis added. These reports must be "detailed" and not "sketchy" or "vague." FED. R. CIV. P. 26, Advisory Committee's Notes, Paragraph 16. "*Preliminary* questions concerning . . . the admissibility of evidence shall be determined by the court. . . . In making its determination it is not bound by the rules of evidence. . . ." FED. R. EVID. 104(a), emphasis added.

If a party seeks summary judgment, it "shall be rendered forthwith if the pleadings, depositions, answers to

interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Any affidavits in opposition to summary judgment "shall set forth such facts *as would be admissible in evidence* . . . showing that there is a *genuine* issue for trial." FED. R. CIV. P. 56(e), emphasis added.

Daubert held that "under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 590. *Kumho* held that this same "gatekeeping" obligation applies to *all* expert testimony, not just that which would be considered "scientific." *Kumho*, 526 U.S. at 147.

> Faced with a proffer of expert . . . testimony, then, the trial judge must determine *at the outset*, pursuant to Rule 104(a), whether the expert is proposing to testify to . . . knowledge that . . . will assist the trier of fact to understand or determine a fact issue. This entails a *preliminary* assessment of whether the reasoning or methodology properly can be applied to the facts in issue.

Daubert at 592-593, footnotes and some text deleted, emphasis added. "These matters should be established by a preponderance of proof." *Daubert* at 593, citing *Bourjaily v. United States*, 483 U.S. 171, 175-176 (1987). *Joiner* clearly established that the standard of review of a district judge's admissibility rulings is "abuse of discretion." *Joiner* at 146.

"[I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient

to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to . . . grant summary judgment, FED. R. CIV. P. 56." *Daubert* at 596.

In the instant case, Petitioner says these rules and guidelines are not enough, and the Court's guidance is "required" to "delineate" procedural protection. (Pet. 12). He complains that "[t]he Court's decisions have not spoken to the parameters of *Daubert* at the summary judgment stage." (Pet. 13). Yet, he admits that *Daubert, Joiner* and *Kumho* all arose in the summary judgment context.

Of even more importance is the fact that the sole purpose of this Court's *Joiner* opinion was to address this very issue. "We granted certiorari in this case to determine what standard an appellate court should apply in reviewing a trial court's decision to admit or exclude expert testimony under *Daubert*." In *Joiner*, the trial court excluded the plaintiff's expert testimony because it "did not rise above 'subjective belief or unsupported speculation.' " *Id.* at 140. The court of appeals applied an "overly 'stringent' review" to the district court's ruling because it was dispositive to the plaintiff's case. *Id.* at 141, 143. A unanimous Supreme Court found this standard of review to be in error because "it failed to give the trial court the deference that is the hallmark of abuse of discretion review." *Id.* at 143.

Contrary to Petitioner's lament, in the unanimous portion of the *Joiner* decision, the Court "spoke" to the parameters of *Daubert* in the summary judgment context:

> A court of appeals applying "abuse of discretion" review . . . may not categorically distinguish between rulings allowing expert testimony and

> rulings which disallow it. . . . We likewise reject defendant's argument that because the granting of summary judgment in this case was "outcome determinative," it should have been subjected to a more searching standard of review . . . the question of admissibility of expert testimony is . . . reviewable under the abuse of discretion standard.

Joiner, 522 U.S. at 142-143, cites and some text omitted.

Joiner already "answered" Petitioner's "question whether *Daubert* analysis should apply in the same measure on summary judgment as at trial," which Petitioner found to be a "particularly troublesome" question. (Pet. 13).

Petitioner seems to actually suggest abandoning the entire summary judgment procedure when *Daubert* issues are involved. In support, he cites *Cortes-Irizarry*, 111 F.3d at 188, and a couple of law review articles suggesting the district court's "gatekeeper" function should be handled at trial. (Pet. 13-15). Of course, this flies in the face of what this Court has established as a fundamental precept of federal jurisprudence. In the landmark case of *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986), this Court observed that "[o]ne of the principle purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose."

If a suggestion that cases having *Daubert* issues should somehow be "immune" from summary judgment can even be taken seriously, it raises a specter of unmanageable federal

dockets. It would virtually guarantee that every Petitioner in federal court would find a *Daubert* issue in his or her case.

In a nod to reality, Petitioner suggests *limine* hearings to resolve a perceived "dichotomy" arising when *Daubert* issues are raised in a summary judgment context. (Pet. 14-15). On the surface, this appears to be a reasonable, prudent policy. However, Petitioner seems to be asking this Court to make such a procedure mandatory, and this is where the proposal runs afoul of well-established precedent painstakingly developed by this Court through the *Daubert* line of cases.

This issue was directly addressed by this Court in *Kumho*: "[t]he trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable." *Kumho* at 152. This Court has consistently and deliberately refrained from dictating a "one-size fits all" approach, consciously preferring to "give the trial court the deference that is the hallmark of abuse of discretion review." *Joiner* at 143.

The *Daubert* Court emphasized a "flexible inquiry," preferring to give the trial courts guidelines rather than procedural mandates. *Daubert* at 579, 593-595. "We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test." *Id.* at 593.

Petitioner uses two Third Circuit cases to support his argument that this Court consider requiring trial courts to

hold *limine* hearings on *Daubert* issues. However, both of these opinions freely acknowledge that such hearings are not always needed. In *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3rd Cir. 1999), the court found that "[a]n *in limine* hearing will obviously not be required whenever a *Daubert* objection is raised to a proffer of expert evidence. Whether to hold one rests in the sound discretion of the district court."

Petitioner also cites *In re TMI Litigation,* 199 F.3d 158, 159 (3rd Cir. 2000) as having held a five week long *in limine* hearing. (Pet. 14). *TMI* was an extraordinarily complex case. It involved thousands of plaintiffs and an accident releasing radioactive materials into the environment from a nuclear power plant. *In re TMI Litigation,* 193 F.3d 613, 623 (3rd Cir. 1999). Obviously, extensive *in limine* hearings were required to consider the *Daubert* issues in this case. However, *In re TMI Litigation,* 199 F.3d 158 (3rd Cir. 2000) was a modification to the previously issued *TMI* opinion, and in it the court made clear that it "did not intend to suggest that an *in limine* hearing is always required for *Daubert* gatekeeping." *Id.* at 159.

A very recent case with an extensive analysis of this issue is *United States v. Alatorre,* 2000 WL 1154280 (9th Cir. (Cal)). The *Alatorre* opinion rejects the idea of mandatory *Daubert* hearings, and supports the flexibility that the courts, especially this Court, have given the trial courts in deciding when and how to make *Daubert* determinations. *See also Kirstein v. Parks Corp.,* 159 F.3d 1065, 1067 (7th Cir. 1998) ("We have not required that the *Daubert* inquiry take any specific form and have, in fact, upheld a judge's *sua sponte* consideration of the admissibility of expert testimony.").

In further support of his urging of mandatory *Daubert* hearings, Petitioner complains of a "complete absence of procedural protection" in the present case. (Pet. 15). This is simply not true. Discovery was exchanged by both parties. Petitioner claimed to have experts, with opinions, "long before" suing Avitech (Pet. App. 24-25), but he ignored the Rule 26 Joint Discovery/Case Management Plan and did not designate any experts until forced to do so by the trial court. It was Petitioner's responsibility, and no one else's, to get before the court the evidence necessary to survive a motion for summary judgment. "[A] litigants' failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigants' own risk." *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 897 (1990). Discovery was not stayed until a year and a half after suit was filed. The court held two pre-trial conferences. Petitioner designated a total of seven experts, all of whom filed reports, with several filing one or more supplemental reports after the stay of discovery. "Since *Daubert*, moreover, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet." *Weisgram v. Marley Co.,* 120 S. Ct. 1011, 1021 (2000). Petitioner filed briefs to the district court in opposition to Avitech's motion for summary judgment and motion to strike his experts. His brief in opposition to summary judgment was supplemented twice. Finally, the court held a hearing more than 21 months after Petitioner filed suit.

Petitioner claims that all of this constituted a "complete absence of procedural protection," yet in the same breath points out that the court of appeals found that it was abuse of discretion to strike his experts. (Pet. 15). His experts were struck because of the wording in the discovery order. (App. 10). This sounds a great deal like "procedural protection."

VI. THERE IS NO NEED FOR THE COURT TO "ELABORATE ON THE KINDS OF CIRCUMSTANCES THAT TRIGGER JUDICIAL SCREENING PURSUANT TO FED. R. EVID. 104(a)."

Petitioner asserts that this Court has "expanded" the "flexible reach of *Daubert*," (Pet. 15), but he fails to identify any such "expansion" other than the one he alleges by the Fifth Circuit in the present case. (Pet. 15-16). Nor does he clearly explain what he is looking for in his request that this Court "elaborate on the kinds of circumstances that trigger judicial screening pursuant to Federal Rules of Evidence 104(a)." The simple answer to the implied question, "when should a party invoke a court's gatekeeping authority" is: whenever the reasoning, methodology or applicability of proffered expert testimony is in question. *Daubert* at 592-593.

Petitioner is concerned that trial courts in general, and the trial court below in particular, improperly make admissibility decisions on the basis of conclusions rather than reasoning, methodology or applicability. This Court has already clearly warned trial courts not to do this. *Daubert* at 595.

The real problem, as this Court has already pointed out, is that "conclusions and methodology are not entirely distinct from one another." *Joiner* at 519. The problem was, in fact, identified eloquently in *Daubert*:

> We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, *inevitably* on occasion will prevent the jury from learning of authentic insights and innovations. That,

> nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.

Daubert at 597, emphasis added.

When dealing with matters such as expert *opinions*, there are limits to what courts can decree as a matter of law. Expert testimony is simply too fact-intensive to "force fit" it into an inflexible mold. The only thing that would make a trial judge's task more difficult in a *Daubert* or Rule 104(a) ruling would be for this Court to dictate exactly how it had to be done. Indeed, as this Court pointed out less than two years ago:

> The factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. . . . The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.

Kumho at 150, citing in part Brief for United States as Amicus Curiae 19.

Petitioner purports to "expose" a split among the circuits on the issue of *Daubert* challenges. He fails. He states that the "Sixth and Tenth Circuits hold that a *Daubert* hearing is not appropriate when an evidentiary challenge is made to the adequacy of any expert's conclusions, rather than the theory or methodology underlying those conclusions." (Pet. 17). This is perfectly consistent with *Daubert*. "The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert* at 595. Petitioner cites *Greenwell v. Boatwright,* 184 F.3d 492, 497 (6th Cir. 1999) in support of his exposé. (Pet. 17). In *Greenwell*, "the factual underpinnings of the expert's testimony were sound," and the plaintiffs did not offer any basis for questioning its scientific validity or relevancy. *Id.* at 498. The Sixth Circuit found no error in admitting the testimony. *Greenwell* was decided in accordance with established *Daubert* principles.

Petitioner states that in *United States v. Nichols,* 169 F.3d 1255, 1263 (10th Cir. 1999), the Daubert challenge was to technique rather than the expert's theory or methodology, and therefore the holding was that the trial court did not abuse its discretion in refusing to hold a Rule 104(a) hearing. (Pet. 17-18). Again, this holding is perfectly consistent with the *Daubert* trilogy, and it is difficult to understand how these two cases are representative of any sort of variant *Daubert* procedures.

Petitioner attempts to contrast the holding in *Greenwell* and *Nichols* with two cases from the Seventh and Eighth Circuits (Pet. 18), saying that the latter are prone to endorse *Daubert* hearings upon challenges to "lack of factual foundation supporting the expert's opinion." (Pet. 18). Again, this does not reveal a problem, and is certainly consistent with the guiding principles of the *Daubert* trilogy.

In *Clark v. Takata Corp.*, 192 F.3d 750, 759-760 (7th Cir. 1999), the trial court found that the plaintiff's expert "failed to identify, much less offer, any evidence to support his conclusion," resulting in the district judge being "unable to determine what methodology or reasoning, if any, serves as the basis for [the expert's] opinions." *Id.* at 758. The judge struck the expert's testimony and granted summary judgment. *Id.* at 755. This was a textbook case for proper procedure when *Daubert* and a motion for summary judgment intersect.

In the other case, *Jaurequi v. Carter Mfg. Co., Inc.*, 173 F.3d 1076 (8th Cir. 1999), Petitioner incorrectly states that there was a *Daubert* hearing at which "the Petitioner failed to make a countervailing factual showing supporting summary testimony of experts." (Pet. 18). He has not accurately described the trial court proceedings. First, there was no *Daubert* hearing. Second, the failure to make a "countervailing factual showing" related only to the summary judgment phase of the proceeding, after the experts testimony had already been struck. *Id.* at 1085. Thus, the "factual showing" issue in the case had nothing to do with *Daubert*.

The Eighth Circuit "closely reviewed" the district court's record and found the experts' testimony "unabashed speculation," "unreliable," and "extremely questionable" before finding that the lower court had not abused its discretion in excluding the testimony under *Daubert* and granting summary judgment. *Id.* at 1084-1085. Again, the case is a perfect example of how *Daubert* is properly used in the summary judgment context.

CONCLUSION

Petitioner has attempted to create an issue where none exists. The Fifth Circuit did not do a *Daubert* review of the trial court proceedings. It not only expressly stated such (App. 16), it considered *all* of the Petitioner's proffered experts and reports in its decision to grant summary judgment pursuant to Federal Rule of Civil Procedure 56(e) and *Anderson v. Liberty Lobby*. (App. 11, 14). It obviously could not have considered these proffers if it had found them inadmissible in a *Daubert* analysis.

Petitioner attempts to convince this Court that it has somehow been remiss in failing to provide adequate "guidance" to the lower courts on how to handle *Daubert* issues which arise in conjunction with motions for summary judgment. The facts demonstrate otherwise. This Court has devoted three landmark decisions, two in the last three years, to this issue. All of these cases arose in the "context" of motions for summary judgment. During the last seven years, almost three *thousand* reported decisions have cited *Daubert, Joiner* or *Kumho.* Petitioner has not cited a single post-*Kumho* decision where a lower court expressed a need for further guidance on this issue from this Court.

There is certainly no need for this Court to "elaborate on the kinds of circumstances that trigger judicial screening pursuant to Federal Rule of Evidence 104(a)." The Court has already made it clear that, as regards Rule 104(a) in the context of application of *Daubert* factors, the courts are to focus on methodology, reliability, and applicability. If courts want to evaluate the conclusions drawn from these factors, they are "free" to use Federal Rule of Civil Procedure 56 and the *Celotex/ Anderson* line of cases.

There is no discernable "split" among the federal circuits in the application of *Daubert* to the summary judgment process. The guiding principals in this matter are some of the most well-developed in our jurisprudence. It is not broken, and therefore does not need to be fixed.

For these reasons, the petition should be denied.

Respectfully submitted,

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